92-727

NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROLAND L. GOAD,

Petitioner

v.

THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROLAND L. GOAD, Petitioner
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(pro se)

26 October 1992

QUESTION PRESENTED

Does Section 1408(f)(1) of Title 10, United States Code [The Uniformed Services Former Spouses' Protection Act (USFSPA)] effect a repeal, by implication, of the Tucker Act [28 U.S.C. § 1491(a)(1)] so as to withdraw this military pay claim from cognizance in the United States Claims Court?

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IN THE

SUPREME COURT OF THE UNITED STATES

NO.

ROLAND LEE GOAD, Petitioner, [1]

versus

THE UNITED STATES, Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Roland Lee Goad, the plaintiff and appellant in the proceedings below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this

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1 / The names of all parties appear in the caption.

case. [Pet.App. 1a]. [2]

CITATION TO OPINIONS BELOW

This military pay case was brought in the United States Claims Court on January 22, 1990 [Pet.App. 44a]. The case was dismissed because "the United States has not waived its immunity to permit a claim challenging the USFSPA, as would be required by the Tucker Act." Goad v. United States, 24 Cl. Ct. 777, 785 (1991) [Pet.App. 34a].

On appeal, the Federal Circuit held that "the FSPA retracts any waiver of sovereign immunity which might be found elsewhere in the United States Code." [Pet.App. 4a] (citing Simanonok v. Simanonok, 918 F.2d 947, 951 (CAFC 1990)) "Mr. Goad has no claim cognizable before the Claims Court." [Pet.App. 4a].

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2 / Refers to the appendix to this petition.

JURISDICTION IN THIS COURT

On August 12, 1992 the United States Court of Appeals for the Federal Circuit affirmed the Claims Court judgment [Pet.App. 1a]. Petition for rehearing and suggestion for rehearing in banc were denied on October 2, 1992. [Pet.App. 42a]. This Petition for Writ of Certiorari will be filed before the expiration of 90 days from October 2, 1992. This Court's jurisdiction to consider this case is invoked pursuant to the provisions of Section 1254(1) of Title 28, United States Code.

JURISDICTION IN THE CLAIMS COURT

Claims Court jurisdiction to consider this military pay case was invoked pursuant to Section 1491(a)(1) of Title 28, United States Code. (Tucker Act). [Pet.App. 44a].

JURISDICTION IN THE COURT OF APPEALS

Section 1295(a)(3) of the Judicial Code provided jurisdiction in the Federal Circuit.

STATUTES INVOLVED

10 U.S.C. § 1408(f)(1)

The United States and any officer and employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

10 U.S.C. § 1461(a)

There is established on the books of the Treasury a fund to be known as the Department of Defense Military Retirement Fund (Hereinafter in this chapter referred to as the "Fund"), which shall be administered by the Secretary of the Treasury. The Fund shall be used for the accumulation of funds in order to finance on an actuarially sound basis liabilities of the Department of Defense under military retirement and survivor benefit programs.

10 U.S.S. § 1463 Payments from the Fund

(a) There shall be paid from the fund —

(1) retired pay payable to members on the retired lists of the Army, Navy, Air Force and Marine Corps;

(2) retired pay payable under chapter 67 of this title to former members of the armed forces (other than retired pay payable by the Secretary of Transportation);

(3) retainer pay payable to members of the Fleet Reserve and Fleet Marine Corps Reserve; and

(4) benefits payable under programs under jurisdiction of the Department of Defense that provides annuities for survivors of members and former members of the armed forces, including chapter 73 of this title, section 4 of Public Law 92-425, and section 5 of Public Law 96-402.

(b) The assets of the Fund are hereby made available for payments under subsection (a).

28 U.S.C. § 1254(1) Courts of Appeals; certiorari, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of the party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1295(a)(3)

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction —

(3) of an appeal from a final decision of the United States Claims Court.

28 U.S.C. § 1491(a)(1):

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

STATEMENT OF THE CASE

Facts

Petitioner earns military retired pay because of his present and continuing status as a member of the Regular Air Force whose name is borne on the retired list; and his availability for immediate recall to active duty at any time. Goad v. United States, 24 Cl.Ct. 777, 778 (1991) [Pet.App. 6a].

Roland and Mary Beth Goad were divorced pursuant to a decree signed by a visiting judge in Brazos County, Texas on September 19, 1980. In the apportionment of community property, Mary Goad was awarded a fraction of Roland's "Air Force Retirement benefits." [Pet.App. 7a]

In McCarty v. McCarty, 453 U.S. 210 (1981), this Court decided that the federal statutes governing military pay prevented state courts from treating such pay as community property. This Court specifically held that "Retired pay cannot be attached to satisfy a property

settlement incident to the dissolution of marriage. In addition, an Army enlisted man may not assign his pay, 37 U.S.C. § 701(c)." McCarty, 453 U.S. at 228 & n.22.

The Uniformed Services Former Spouses' Protection Act was enacted effective February 1, 1983 purporting to retroactively annul this Court's McCarty decision. The USFSPA permits a court of "competent jurisdiction" to award an amount expressed in dollars or as a percentage of "disposable retired pay" to a former spouse in a dissolution proceeding. No provision is made for the apportionment of "Air Force Retirement benefits."

On June 24, 1985 Mary Beth Goad submitted an ex parte application to the Government for payments from Petitioner's pay. Her request was not accompanied by, nor joined with, any writ, order, summons, or similar process in the nature of garnishment directed to the Government. Her request was immediately

approved and payments began for the month of August 1985. Petitioner's first notice that his pay had been subjected to garnishment was sent to him after Mary Beth Goad's ex parte application had already been approved. The Government's procedure does not provide for any prior notice or an opportunity for a hearing before approval of such applications.

COURSE OF PROCEEDINGS IN CLAIMS COURT

Original complaint was filed on January 22, 1990. [Pet.App. 44a]. Petitioner moved for summary judgment and presented eight (8) issues for consideration:

FIRST: The anti-assignment statute (37 U.S.C. § 701(c)) has not been amended, modified, or repealed in any manner that would contradict this Court's holding in McCarty and therefore remains valid notwithstanding Congress' declaration in the USFSPA. Petitioner reasoned that Congress was without power to set aside the construction of a statute that it permits

to remain in force.

SECOND: Military pay, while in the hands of a disbursing agent remains exempt from garnishment in satisfaction of property awards because of the restriction on garnishment in the Texas Constitution and the Federal Consumer Credit Protection Act.

THIRD: The divorce court never acquired in rem jurisdiction over Petitioner's future pay in the divorce proceeding. Petitioner reasoned that public money in the United States Treasury was extra patrimonium — not capable of being privately owned.

FOURTH: Pay earned for personal services performed by the Petitioner after the date of divorce was not a part of the estate subject to apportionment because it was not yet in existence at that time.

FIFTH: Procedures established under the USFSPA failed to satisfy due process because of the failure to provide notice and an oppo-

rtunity to be heard before garnishment of pay in satisfaction of "property" awards.

SIXTH: The "direct garnishment" procedure infringed on the retained powers reserved to the States under the police power under which such procedures lay in the exclusive province of the local law for the enforcement of judgments.

SEVENTH: The Act was infirm because it delegated power to State judges to determine what pay would be received by a military member when, under the Constitution, that power lay exclusively in the Legislative Department of the federal government.

EIGHTH: The divorce decree was not a "court order" as defined in the USFSPA because it did not apportion "disposable retired pay" as required by the statute.

These eight questions, as framed in the brief filed in the Claims Court, are set out in the appendix. [Pet.App. 58a].

Petitioner specifically invoked Section 1463 of Title 10 as the "money mandating" statute under the Tucker Act [Pet.App. 53a]. But the Government's motion to dismiss was granted and Petitioner's motion for summary judgment was denied as "moot" because:

> Mr. Goad must show a statutory or constitutional provision affording him the right to the payment of money by the United States in order for this court to grant him jurisdiction over his claim.

Goad v. United States, 24 Cl.Ct. 777, 784 (1991) [Pet.App. 33a].

COURSE OF PROCEEDINGS IN COURT OF APPEALS

In the Federal Circuit, Petitioner presented six issues for consideration. [Pet.App. 60a]. But for the purposes of this Court's review, the first issue is relevant:

[1] Section 1463(a)(1) of Title 10, United States Code provides for a monthly payment to Appellant out of the DOD Military Retirement Fund. Does that statute provide the

jurisdictional basis for an action in the United States Claims Court for the recovery of amounts of Appellant's salary withheld since September 1, 1985? [Pet.App. 60a].

The Federal Circuit, in AFFIRMING the dismissal of the complaint in the Claims Court held:

> The Claims Court was correct as a matter of law. Mr. Goad cannot recover from the United States the money paid to Mrs. Goad. Mr. Goad has no claim cognizable before the Claims Court. This court properly dismissed his action.

Pet.App. 4a.

The affirmance was predicated on the dicta in Simanonok v. Simanonok, 918 F.2d 947, 951 (CAFC 1990) that "the FSPA retr-acts any waiver of sovereign immunity which might be found elsewhere in the United States Code." [Pet.App. 4a].

Petitioner brings this petition for a writ of certiorari to review the decision of the Federal Circuit.

How the Claims Court Erred

The Claims Court's erudite discussion of this case failed to take into account the familiar well-pleaded complaint rule. For purposes of jurisdiction, we look only to the properly pleaded complaint or petition. E.g., Franchise Tax Board v. Construction Vacation Trust, 463 U.S. 1, 9-10 (1983).

> "[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, ... must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidances or defenses which it is thought the defendant may interpose."

Taylor v. Anderson, 234 U.S. 74, 65-76 (1914). "A suit arises under the law that creates the cause of action." American Well Works v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.).

If the statute cited by the claimant mandates payment by the government, the Tucker Act authorizes suit in the Claims Court.

Vogue v. United States, 844 F.2d 776, 779 (CAFC 1988), cert. denied, 488 U.S. 941 (1989). If the plaintiff asserts that his claim "arises under" or is "founded" on federal legislation or regulation [see United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 32 (1915)], "[t]o determine whether the claim is well founded," the court must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative." Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 249 (1951). "Unsuccessful as well as successful suits may be brought" upon a federal act or regulation. The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913). And when an action rests upon a statute or regulation, that particular enactment need not contain a specific provision permitting a suit for money, the Tucker Act serves the purpose. Simon v. United States, 113

Ct.Cl. 182, 190-191 (1949); United States v. Mitchell, 463 U.S. 206 (1983).

Amendment or repeal of Tucker Act remedies is not to be implied. Tipperary Refining Co. v. United States, 11 Cl.Ct. 572, 576-77, aff'd, 833 F.2d 301 (CAFC 1987), cert. denied, 486 U.S. 1006 (1988).

How the Federal Circuit Erred

In Simanonok v. Simanonok, 918 F.2d 947, 951 (CAFC 1990) it was stated that "because the district court lacked jurisdiction over the United States claims, we obviously lack appellate jurisdiction over those claims as well." Then the court went on to state in obiter dicta that "the FSPA itself clearly deprives retirees such as Simanonok of any recovery from the United States or its agents merely for carrying out the Act – i.e. the FSPA retracts any waiver of sovereign immunity which might be found elsewhere in the United States Code." 918 F.2d at 951.

Just four terms ago, this Court cautioned that courts have no authority to reach the merits of a case in the absence of subject matter jurisdiction, even if they perceive it to be "in the interest of justice" to do so. Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988). "A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it." Willy v. Coastal Corp., 112 S.Ct. 1076, 1080 (1992). The Federal Circuit's dicta in Simanonok can have no application in this case. In affirming the dismissal of Petitioner's complaint, the Federal Circuit made a global assertion that "the FSPA retracts any waiver of sovereign immunity which might be found elsewhere in the United States Code." [Pet.App. 4a]. This wild assertion must be rejected out of hand. The court was not free to conclude that the USFSPA accomplished

deviously that which for certainty's sake should have been accomplished directly, if it could be accomplished at all.

Except where an act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot, by a fair and reasonable construction, be reconciled and given effect and enforced concurrently. 73 Am.Jur.2d Statutes § 401 (1974). It will not do to give this principle of statutory interpretation mere lip service and vacillating practical application. A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of

the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effect of an earlier law that they favor or oppose. United States v. Hansen, 249 U.S.App.D.C. 22, 772 F.2d 940, 944 (1985) (Scalia, J.), cert. denied, 475 U.S. 1045 (1986).

"When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation." Colorado River Conser. Dist. v. United States, 424 U.S. 800, 808 (1976); Rosecrans v. United States, 165

U.S. 257, 262 (1897). Repeals of jurisdiction are not favored, especially where original grant of jurisdiction is specific in statute rather than implied by courts. National Leased Housing Ass'n v. United States, 22 Cl.Ct. 649, 653-654 (1991).

The rule is, that an ancient statute will be impliedly repealed by a later one only when the later is couched in negative terms, or when the matter is so clearly repugnant that it necessarily implies a negative. Where both acts are affirmative and the substance such that both may stand together, both are held to be in force. United States v. Gillis, 95 U.S. 407, 416 (1877); Dr. Foster's Case, 11 Co. 56, 63, 77 Eng.Rep. 1222, 1231 (K.B. 1615). "The repeal of a law, by implication and construction of a subsequent law, should be so clear as to leave no reasonable doubt that such was the intention of the legislature; it should be as certain as an express

repeal. It should not be deduced by an ingenious course of argument, but should appear at once." United States v. Taylor, Crabbe 356, 370, 28 F.Cas. 257, 267, Fed.Cas.No. 16,563 (E.D.Pa. 1840), aff'd, 3 How. (44 U.S.) 197 (1845).

Even where a repeal would be implied as between general acts, such repeals of special acts by a general act will not be implied. There, even where the words of the general act embrace the special act, no repeal will be implied, but the special act will be construed to be an exception to the general act, unless it is absolutely necessary to so construe it in order to give its words any meaning at all. Petri v. F.E. Creelman Lumber Co., 199 U.S. 487, 497 (1905).

Where a claim appears to be within the Court's jurisdictional statute, as for example one founded on statute or contract, that claim is not removed from the Court's juris-

diction merely because a plaintiff must make a constitutional argument to prevail. Gentry v. United States, 212 Ct.Cl. 1, 5-8, 546 F.2d 343, 345-6 (1976); Alabama Hosp. Ass'n v. United States, 228 Ct.Cl. 176, 656 F.2d 606, 609-610 (1981), cert. denied, 456 U.S. 943 (1982).

It must not be supposed that the Legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore displace the prior statute. Frost v. Wenie, 157 U.S. 46, 57 (1894); Red Rock v. Henry, 106 U.S. 596, 601 (1883); King v. Cornell, 106 U.S. 395, 396 (1882); In re Henderson, 11 Wall. (78 U.S.) 652, 657 (1871); United States v. Tynen, 11 Wall. (78 U.S.) 88, 93 (1871); McCool v. Smith, 1 Black (66 U.S.) 459, 468 (1862).

"An affirmative act which gives a new right does not destroy an existing statutory right, unless the intention be apparent that the two rights should not coexist; and where two acts are merely affirmative, and the substance such that both may stand together, the later does not repeal the earlier, but they both have concurrent efficacy." Backus v. United States, 75 Ct.Cl. 69, 100, 59 F.2d 242, 257 (1932), cert. denied, 288 U.S. 610 (1933).

It is the "duty" of the court "to give effect to both the old and new statute, if that can be done consistently with the words employed by Congress in each." United States v. Healey, 160 U.S. 136, 146 (1895). A law is not to be construed as impliedly repealing a prior law "unless no other reasonable construction can be applied." United States v. Jackson, 302 U.S. 628, 631 (1938). To find a repeal, it must be "impossible" for both

provisions under consideration to stand. Wilmot v. Mudge, 103 U.S. 217, 221 (1880). Repeals by implication "are never admitted where the former can stand with the new act." Chew Heong v. United States, 112 U.S. 536, 549 (1884). "If, by any reasonable construction, the two statutes can stand together, they must so stand." South Carolina v. Stoll, 17 Wall. (84 U.S.) 425, 431 (1873). And where express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy between the statutes so as to preclude the presumption, or the later statute revises the whole subject matter of the former. Allen v. United States, 117 Ct.Cl. 385, 387, 91 F.Supp. 933, 936 (1950). The implication must be clear, necessary, irresistible, and free from reasonable doubt. Casman v. United States, 143 Ct.Cl. 16, 20, 181 F.Supp. 404, 406 (1958).

Petitioner's military pay is fixed by federal law. And, services rendered under the requirements of law or of contract, for which compensation is fixed, constitutes a legal demand. Emerson v. Hall, 13 Pet. (38 U.S.) 409, 411 (1839). Furthermore, "the promised compensation for services actually performed and accepted ... may undoubtedly be claimed both upon principles of compact and of equity." Butler v. Pennsylvania, 10 How. (51 U.S.) 402, 416 (1850). In other words, when a soldier has performed the services for which pay is authorized, he then has a vested common-law right to claim the statutory salary that has accrued because of those services.

No statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of actions, or with vested rights, unless the intention that it shall so operate is expressly decl-

ared or is to be necessarily implied, and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have retroactive operation. Even though the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms. Twenty Per Cent Cases, 20 Wall. (87 U.S.) 179, 187 (1874). No silent implied and constructive repeals ought ever to be understood to devest a vested right. Rutherford v. Green, 2 Wheat. (15 U.S.) 196, 203 (1817). This doctrine of the repeal of statutes and the destruction of vested rights by implication is unfavored in the law. Every doubt should

be resolved against a construction so fraught with mischiefs. There is nothing in the language of the USFSPA which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such would be its effect. The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be "without due process of law." This is forbidden by the fundamental principles of the social compact. Osborn v. Nicholson, 13 Wall. (80 U.S.) 654, 662 (1872); Wilkinson v. Leland, 2 Pet. (27 U.S.) 628, 658 (1829); Denny v. Mattoon, 2 Allen (84 Mass.) 361, 381-2 (1861); Wynehamer v. The People, 3 Kernan (13 N.Y.) 378, 394 (1856); Hoke v. Henderson, 4 Dev. (15 N.C.) 1, 15 (1833).

Why A Claims Court? [3]

The Government has developed a system which enables its citizens to assert claims against it and receive fair and just compensation when those claims are justified. The Court was established in 1855 to provide a better way of meeting those needs. As the principal forum for adjudication of claims against the United States, it played a vital role in the functions and structure of our Government. Military pay cases have always been an important part of the court's cases. The first reported case, Todd v. United States, Ct.Cl. Rep. No. 1 to the House of Representatives, 34th Cong., 1st Sess. (Serial Set 871) (Mar. 6, 1856), was a pay case. The court recommended payment of $553

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3 / See: W. Cowen, P. Nichols, Jr.. M. Bennett, THE UNITED STATES COURT OF CLAIMS, A HISTORY, PART II, ORIGIN — DEVELOPMENT — JURISDICTION, 1855-1978, reprinted in 216 Ct.Cl. 1-183 (1978).

in settlement of the account of a Navy purser, arising during the War of 1812. No statute of limitation had yet been adopted.

"Whatever the caprice with which the sovereign has expanded or contracted its consent to be sued over the span of the years, there still exists, and will always exist, a need to bring the Government before the bar of justice when it has made a judicially remediable error. ... The individual needs protection against the excesses of big government, and the Government needs protection against the unreasonable demands of some citizens. How better to meet these needs than in a court free from local influences and prejudices, and with the opportunity to set a uniform rule of law in cases because of its nationwide jurisdiction?" ...

"Finally, as the Government grows even larger, it is essential that it should never become more powerful before the law than its

most humble citizen, if our system is to survive in freedom. A unique and permanent contribution that the Court of Claims has made over the span of its long life as a public institution is in how it helps to make Government officials accountable to the citizens whose servants they are, but whose relationship to their masters is sometimes forgotten. In helping to inspire a high standard of conduct for Government officials, it serves the nation well. If there is a constant thread running through the court's decisions, it would seem to be in holding the Government and its officials to a strict code of conduct in their relations with citizens. While this duty is shared by other courts, it is a special responsibility for a court created as the main forum for claims against the sovereign. The basic assumption is that the Government can be wrong — a concept rejected by most governments in the world today — and

that where found to be wrong it will be brought to account and made to pay. ... Such a court is the flower of a free society." The United States Court of Claims, A History, 216 Ct.Cl. 1, 169-171 (1978).

George Wythe gave pioneer expression to the idea of judicial review of legislative acts:

> Among all the advantages, which have arisen to mankind, from the study of letters, and the universal diffusion of knowledge, there is none of more importance, than the tendency they have had to produce discussions upon the respective rights of the sovereign and the subject; and upon the powers which the different branches of government may exercise. For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizen protected, and general liberty promoted. But this beneficial result attains to higher perfection, when those, who hold the purse and the sword, differing as to the powers which each may exercise, the tribunals, who hold neither, are called upon to declare the law impartially between them. For thus the pretensions of each party are fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established."

Commonwealth v. Caton, 4 Call.(8 Va.) 5, 7 (1782).

Why a "Tucker Act"?

"IT IS AS MUCH THE DUTY OF GOVERNMENT TO RENDER PROMPT JUSTICE AGAINST ITSELF, IN FAVOR OF CITIZENS, AS IT IS TO ADMINISTER THE SAME BETWEEN PRIVATE INDIVIDUALS." [4]

In proposing the Tucker Act (25 Stat. 505, March 3, 1887), Representative Randolph Tucker of Virginia sought to relieve himself and his colleagues of a large mass of private claims which encumbered their business and prevented them from discharging the other duties in the interest of the country. The Act proposed to expand the Court of Claims jurisdiction beyond that established in 1855; however, the court had already exercised the jurisdiction to hear and determine claims founded upon federal law.

Justice Holmes, speaking for this Court in

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4 / State of the Union Message by President Lincoln, Dec. 3, 1861, quoted in Cong. Globe, 37th Cong., 2nd Sess., Pt. IV, App. at 2 (1862).

United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 32 (1915), said in interpreting the Tucker Act: "[It is an] inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye."

"'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" Block v. Neal, 460 U.S. 289, 298 (1983) (quoting Anderson v. Hayes Constr. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)).

By establishing the Claims Court, a tribunal was created to determine the right to receive money due from the government and it did not "leave the Treasury or its officers free to arbitrarily select, between conflicting claimants, the one to whom payment should be

made." United States v. Borcherling, 185 U.S. 223, 234 (1902).

REASON FOR GRANTING THE WRIT

The Tucker Act constitutes the required waiver of sovereign immunity. In United States v. Mitchell, 463 U.S. 206 (1983), this Court concluded that by giving the Claims Court jurisdiction over specified types of claims against the United States, the Tucker Act constituted a waiver of sovereign immunity with respect to those claims. The Department of Defense Military Retirement Fund was established for the especial benefit of military personnel whose names are borne on the retired lists and therefore that statute provides the proper statutory basis for this pay claim under the methodology established in Cort v. Ash, 422 U.S, 66 (1975).

Petitioner's right to bring this action in the Claims Court for recovery of his pay

is not a privilege that may be granted or denied at the Government's whim. It is this right to vindicate one's rights in a court of justice that is at the heart of the right to "due process of law." This right to petition for redress is at the very core of the First Amendment protections accorded to all of us. The right to petition is the birthright of every American and the accepted heritage of all civilized peoples. To refuse this Petition would permit the Court to "disregard the considered limitations of the law it is charged with enforcing." Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988). Courts are established to render justice for the parties. A court is supposed to apply the correct law to matters before it, not apply law it knows is wrong.

CONCLUSION

Petitioner respectfully requests the Court to exercise its discretion by granting this Petition and remand the entire case to the United States Court of Appeals for the Federal Circuit with instructions to proceed with the appeal and consider those questions properly raised by the parties.

Respectfully submitted.

ROLAND L. GOAD, Petitioner
310 Sara Lane
Huntsville,Texas 77340
(409) 291-2430
(pro se)

26 October 1992

Opinion of the United States Court of Appeals for the Federal Circuit, filed on August 12, 1992 affirming Goad v. United States, 24 Cl.Ct. 777 (1991).

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEAL
FOR THE FEDERAL CIRCUIT

92-5053

ROLAND L. GOAD,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Decided: August 12, 1992

Before ARCHER, Circuit Judge, SKELTON, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

DECISION

Mr. Roland L. Goad appeals the RUSCC 12(b)(4) dismissal of his claim for refund of

military retirement funds paid to his ex-wife. This court affirms.

OPINION

On September 19, 1980, Mr. amd Mrs. Goad were divorced. The divorce decree awarded Mrs. Goad twelve twenty-sevenths (12/27) of Mr. Goad's Air Force Retirement benefits. Mr. Goad did not pay Mrs. Goad the portion of his retirement awarded by the divorce decree. In 1985, Mrs. Goad applied to the Air Force Accounting and Finance Center (AFAFC) for direct payment of her portion of the retirement benefit. The Uniformed Services Former Spouses' Protection Act (USFSPA) authorized direct payment. See 10 U.S.C. § 1408 (1988). Mr. Goad objected to the direct payments, but the AFAFC found no merit in Mr. Goad's objections.

Mr. Goad filed a complaint in the United States Claims Court seeking the return of funds paid to Mrs. Goad by the government.

The Claims Court dismissed Mr. Goad's complaint for "failure to state a claim upon which relief can be granted." RUSCC 12(b)(4). The Claims Court reasoned that the United States had not waived its sovereign immunity for suits seeking refund of USFSPA payments. Therefore, Mr. Goad did not state a claim cognizable in the Claims Court.

Section 1408(f)(1) of Title 10 (1988) says:

> The United States and any officer and employee of the United States shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to [this Act].

(Emphasis added.)

The Claims Court found that the court order mandating payment was "regular on its face." Furthermore, Mr. Goad makes no argument that the payments were not made in accordance with the USFSPA.

In Simanonok v. Simanonok, 918 F.2d 947

(Fed. Cir. 1990), this court characterized a claim similar to Mr. Goad's as frivolous":

> The foundation of [Plaintiff's] suit is the asserted unconstitutionality of the FSPA, and his claims against all defendants seek recovery for their actions in implementing and carrying out the FSPA. Yet the FSPA itself clearly deprives retirees such as [Plaintiff] of any recovery from the United States or its agents merely for carrying out the act -- i.e. the FSPA retracts any waiver of sovereign immunity which might be found elsewhere in the United States Code.

Id. at 951.

The Claims Court was correct as a matter of law. Mr. Goad cannot recover from the United States the money paid to Mrs. Goad. Mr. Goad has no claim cognizable before the Claims Court. This court properly dismissed his action.

Opinion of the United States Claims Court, filed on December 23, 1991, published in 24 Cl.Ct. 777 (1991). Appealed to Federal Circuit and affirmed, No. 92-5053.

IN THE UNITED STATES CLAIMS COURT
No. 90-72C

(Filed: December 23, 1991)

ROLAND L. GOAD,	)	Motion for summary judgment; retired member of U.S. Air Force; Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408; honor state court orders granting portions of military retirement benefits to former spouse.
Plaintiff	)	
v.	)	
THE UNITED STATES,	)	
Defendant	)	

Roland L. Goad, Huntsville, Texas, pro se plaintiff.

James M. Kinsella, Washington, D.C., with whom was Assistant Attorney General Stuart M. Gerson, for defendant.

OPINION

REGINALD W. GIBSON, Judge:

Introduction

This military pay case is before the court

on the Plaintiff's Motion for Summary Judgment and the Defendant's Motion To Dismiss. Both parties have filed their respective oppositions to the foregoing motions. The issues have been fully briefed and, for the following reasons, the defendant's motion to dismiss is granted and the plaintiff's motion for summary judgment is denied as moot.

Facts

Roland Lee Goad, plaintiff, is a member of the United States Air Force on the retired list. Mr. Goad remains entitled to earn pay based on his continuing military status and his availability for immediate recall if the Secretary of the Air Force deems it to be necessary.

On September 19, 1980, after 30 years of marriage, Roland Goad and his wife, Mary Beth, were divorced in the 272nd District Court of Brazos County, Texas. Pursuant to the divorce decree, Mrs. Goad was awarded twelve twenty-

sevenths (12/27) of plaintiff's Air Force retirement benefits." [1] Mr. Goad refused to comply with the payment as ordered by the divorce decree, and, on January 7, 1985, the same court which had issued the divorce decree held Mr. Goad in contempt. That court also found that Mr. Goad was in arrears to Mrs. Goad in the total sum of $30,099.42. [2]

In 1982, the United States Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA). [3] The essential purpose of the USFSPA was to remedy the prior Supreme Court decision in McCarty v. McCarty, 453

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1 / The language of the divorce decree states that "IT IS FURTHER ORDERED, that ROLAND LEE GOAD, shall, upon receipt of all United States Air Force Retirement benefits, immediately deliver twelve/twenty-sevenths (12/27) of said retirement benefit, by United States mail to MARY BETH GOAD at her current place of residence."

2 / Plaintiff subsequently filed a petition for a writ of habeas corpus in the Texas Supreme Court, seeking relief from the district court order issued on January 7, 1985. The Texas Supreme Court denied his petition.

3 / [next page]

3/ 10 U.S.C. § 1408 (1988). Pertinent sections of this statute are as follows:

10 U.S.C. § 1408(a)(1)(A): (a) In this section: (1) "Court" means - (A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands; (B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and (C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

10 U.S.C. § 1408(a)(2): (2) "Court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree ... which - (C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

10 U.S.C. § 1408(c)(1): Subject to the limitations of this section, the court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of that member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(g): A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981) (holding that military retirement pay was not divisible community property because the grant to a spouse contravened Congress's intention that such pay actually reach the beneficiary). The USFSPA unequivocally alters the holding in McCarty. For example, the USFSPA allows the federal government to honor a state court order which grants a segment of military retirement benefits to former spouses of military employees. The statute also allows, under particular circumstances, the withholding and direct transfer of the court-ordered amount to the former spouse. 10 U.S.C. § 1408(d).

Pursuant to the USFSPA, on June 24, 1985, Mrs. Goad applied to the Air Force Accounting and Finance Center (AFAFC) to receive directly a portion of Mr. Goad's retirement pay. [4] On June 28, 1985, the AFAFC forwarded to the

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4 / Mrs. Goad's application included a copy of the divorce decree, the contempt order, and the denial of habeas corpus relief.

plaintiff a notice that it had received Mrs. Goad's application for benefits under the USFSPA. The letter sent to the plaintiff stated that the United States Air Force was required by federal law to honor Mrs. Goad's request. However, the letter also advised the plaintiff that if there existed any "conflicting court orders" which cast doubt upon the divorce decree, these orders should be sent to the AFAFC within 30 days. If such orders were not sent within this time frame, the AFAFC stated that the requested fraction (or percentage) of benefits would be deducted from Mr. Goad's August 1985 retired pay. [5] Although the plaintiff forwarded two objection letters to the AFAFC, it found no merit in them and subsequently began withholding twelve twenty-sevenths (12/27) of plaintiff's retired pay for Mrs. Goad.

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5 / Mrs. Goad was not seeking any retroactive benefits.

In December of 1985, Mr. Goad asked the AFAFC to reconsider its decision. The AFAFC again denied Mr. Goad's request. Following this rejection, Mr. Goad filed an action in the United States District Court for the Southern District of Texas. [6] In that action, he challenged the constitutionality of the USFSPA and the actions of the AFAFC. The court held that plaintiff's "action for monetary relief must be dismissed because this Court lacks subject matter jurisdiction under the Tucker Act." Id. at 1076. The court reasoned that the Tucker Act confers concurrent jurisdiction to both the United States District Courts and the United States Claims Court for claims not involving torts against the United States for damages not in excess of

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6 / Goad v. United States, 661 F.Supp. 1073 (S.D. Tex.), aff'd in part, vacated in part, 837 F.2d 1096 (Fed.Cir. 1987), cert. denied, 485 U.S. 906 (1988). The undisputable facts at bar, substantially mirror the facts in the district court litigation.

$10,000. 28 U.S.C. § 1346(a)(2) (1982). However, claims in excess of $10,000 are within the exclusive jurisdiction of the United States Claims Court. Since the district court found Mr.[] Goad's claim to exceed $10,000, the court held that it lacked the requisite jurisdiction to entertain the claim.

Nevertheless, the district court did hold that it possessed the requisite subject matter jurisdiction to consider the plaintiff's claim for declaratory relief — specifically that the AFAFC payments directly to Mrs. Goad violated federal statutes, the United States Constitution, and the State of Texas Constitution. [7] The district court held that each of

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7 / Plaintiff's complaint in the district court asserted the following claims:

1. The AFAFC's direct payments to Mrs Goad violated the USFSPA.
2. The AFAFC's direct payments to Mrs. Goad are prohibited by the Texas Constitution.
3. The AFAFC's direct payments to Mrs. Goad violated Consumer Protection Act.
4. The AFAFC's direct payments to Mrs. Goad violated 37 U.S.C. § 701(c) (1988). (Cont'd)

the asserted claims lacked merit, and, therefore, dismissed the suit. In addition, because the court found that each claim lacked merit, the court declined to transfer the suit to the United States Claims Court pursuant to 28 U.S.C. § 1631, inasmuch as it would not be in the "interest of justice." Goad, 661 F.Supp. at 1077. [8]

(note 7 cont'd)

5. The USFSPA is unconstitutional because it deprives the plaintiff of due process and equal protection.

6. The Goad's divorce decree was invalidated by the McCarty decision and cannot be resuscitated by the USFSPA.

7. The USFSPA is unconstitutional because it impermissibly delegates legislative power to the states.

Goad, 661 F.Supp. at 1077.

8 / Pursuant to Fed. R. Civ. P. 11, the district court also awarded sanctions against Mr. Goad. First, the court found that Mr. Goad's claims were not warranted by existing law, but rather that they were "patently frivolous." Id. at 1080-81. Second, the court found that there existed a "meanness of spirit" in Mr. Goad's action. Id. at 1081. (Mr. Goad's persistent attempts to strip Mrs. Goad of the property granted to her by the divorce decree and to punish the AFAFC for honoring that decree can only be characterized as harassment."). As a result the district court ordered sanctions in the amount of $4,748.40. Id.

Mr. Goad appealed the judgment of the United States District Court for the Southern District of Texas to the United States Court of Appeals for the Federal Circuit. [9] The Federal Circuit affirmed the segments of the district court's holding dismissing the suit for lack of jurisdiction, refusing to transfer the action to the United States Claims Court because the transfer would not be in the interest of justice, and awarding sanctions pursuant to Fed. R. Civ. P. 11. However, the Federal Circuit reversed the district court's holding that it possessed the requisite jurisdiction to hear Mr. Goad's suit for declaratory relief. As a result, the Federal Circuit vacated the grant of summary judgment, and remanded to the district court with instructions to dismiss the complaint for lack of jurisdiction.

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9 / Goad v. United States, No. 87-1488, slip op. (Fed. Cir. Dec. 9, 1987).

On January 22, 1990, Mr. Goad filed a complaint, pro se, in this court, seeking to obtain a judgment on those amounts of his salary that were withheld and forwarded to Mrs. Goad since September 1, 1985. In his complaint, plaintiff asserts the following bases for his claims:

1. The divorce decree does not qualify as a court order under the USFSPA;
2. Plaintiff's pay is exempt from executing garnishment, levy, or seizure in satisfaction of a community property claim;
3. The fact that Congress declared that the USFSPA would apply retroactively and thereby annul a prior United States Supreme Court decision contravenes the principles of separation of powers;
4. Congress has acted in excess of its authority by delegating to state courts the authority to determine whether or not to apportion retired pay as community property;
5. The direct pay procedures of the United States Air Force has deprived the plaintiff of his pay without due process of law; and
6. The USFSPA which allows direct payments from the AFAFC without having to resort to periodic state garnishment procedures violates the equal protection of the law as mandated by the Fifth Amendment to the United States Constitution.

On March 23, 1990, plaintiff filed a motion for summary judgment with supporting affidavit pursuant to RUSCC 56(a). On May 21, 1990, the defendant filed a motion to dismiss for failure to state a claim pursuant to RUSCC 12(d)(4) and a response to plaintiff's motion for summary judgment. On June 5, 1990, plaintiff filed a reply to the defendant's motion to dismiss, [10] and on June 28, 1990, the defendant filed a reply brief. It is the motion for summary judgment and motion to dismiss which the following contentions and discussion will address.

Contentions of the Parties

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10 / In his June 5, 1990 submission, the plaintiff also moved to "strike out and disregard the insufficient defenses of 'sovereign immunity' and 'res judicata' put forth by the defendant in its motion to dismiss; and to strike out and disregard those documents appended to Defendant's motion that are redundant or contain immaterial, impertinent, or scandalous matter." Defendant filed a response thereto on June 28, 1990, and plaintiff filed a reply on July 9, 1990. This court finds no justification for the plaintiff's arguments with respect to this motion and thereby denies said motion to strike.

1. Plaintiff

Plaintiff, in his motion for summary judgment, is seeking two legal conclusions. First, he is requesting that this court grant an order quashing, dissolving, and recalling DD Form 2293 ("Request for Former Spouse Payments From Retired Pay") which is dated June 24, 1985. This is the form which Mrs. Mary Beth Goad submitted to determine if she was eligible for payments from her former spouse's retired pay. Secondly, the plaintiff is requesting that judgment be entered against the United States for all amounts of plaintiff's pay that have been withheld under the USFSPA since September 1, 1985, and for plaintiff's court costs and other relief to which this court believes the plaintiff is entitled.

In support of his summary judgment motion, plaintiff makes the following arguments. First, the plaintiff contends that regardless of the passage of the USFSPA, 37 U.S.C.

§ 701(c) remains valid and therefore still applies to community property claims. 37 U.S.C. § 701(c), known as the Anti-Assignment Statute, states that "[a]n enlisted member of the Army or Air Force may not assign his pay, and if he does so, the assignment is void." The United States Supreme Court addressed the statute in McCarty, 453 U.S. at 228-229 n.22 ("[r]etired pay cannot be attached to satisfy a property settlement incident to the dissolution of marriage. ... In addition, any Army enlisted man may not assign his pay. 37 U.S.C. § 701(c)."). Based on this authority, plaintiff argues that because he had not yet earned any prospective pay at the time of the divorce decree in 1980, it was not property in possession. As a result, plaintiff contends that strong public policy considerations exist which are in contravention of the assignment of a public servant's unearned income. Furthermore, the plaintiff argues that 37

U.S.C. § 701(c) has not been repealed, modified, or amended by Congress in a way which could contradict McCarty. Finally, plaintiff notes that even though the United States District Court for the Southern District of Texas found that the argument that direct payments to Mrs. Goad violated 37 U.S.C. § 701(c) was without merit, the United States Court of Appeals for the Federal Circuit vacated this portion of the holding because it found that the district court was without jurisdiction to entertain the declaratory relief claim.

Plaintiff's second contention is that disposable retired pay held by the United States Air Force remains exempt from execution, attachment, levy, service, or garnishment in satisfaction of a community property award. In support of his contention, plaintiff notes that the Consumer Credit Protection Act (CCPA), 15 U.S.C. §§ 1671-1677, limits the maximum amount of an individual's earnings subject to garnishment to

25% of disposable income. The plaintiff also notes that the effect of the 1974 Social Service Amendments to the CCPA was to bring the federal government under control of the individual state garnishment laws as if the federal government were a private employer within the state. Therefore, the plaintiff argues that under Texas law, garnishment is not available to a spouse seeking to enforce an order awarding the pay as community property in a divorce. In addition, plaintiff quotes the Texas Constitution which states that:

> No current wages for personal services shall ever be subject to garnishment, except for the enforcement of court ordered child support payments.

Tex. Const., Art. XVI, § 28.

Plaintiff's third argument is that the Texas state court which issued the 1980 divorce decree did not possess the requisite jurisdiction over the plaintiff's disposable retired pay, and, therefore, did not possess

the authority to order the pay to be partitioned. Principally, the plaintiff argues that because the res (retired pay) which Mrs. Goad sought had never been located in Texas, but rather was in the possession of the United States Treasury, the Air Force was not amenable to process by the Texas state court. As a result, plaintiff contends that the Texas state court did not have personal jurisdiction in rem over the holder of the res. As support, plaintiff states that debt due from the United States cannot be treated as local assets subject to in rem jurisdiction because the United States in its sovereign capacity possesses no particular place of domicile.

The fourth contention offered by the plaintiff is that military retired pay which is earned for services performed after the divorce has occurred does not constitute a part of the "estate of the parties" which is subject to apportionment. In addition, the plaintiff

argues that no right to retired pay accrues to a military serviceman by virtue of past military service, but that the determining factor is his present status. In this instance, the plaintiff contends that his office is not property and the prospective pay is not personal property [or] an "account receivable" that can be a part of a divorce apportionment.

Plaintiff's fifth argument is that the USFSPA violates the Due Process Clause of the Fifth Amendment of the United States Constitution because the USFSPA did not provide him with a proper forum to challenge the direct diversion of funds to his former spouse. Specifically, plaintiff points to the fact that Mrs. Goad's application was not accompanied by any legal process from a court directed to the United States Air Force, and the fact that the plaintiff was notified by the Air Force after Mrs. Goad's application had already been approved.

The sixth argument offered by the plaintiff is that the USFSPA violates equal protection under the United States Constitution by providing special privileges to former spouses of retired military members. In support of his argument, the plaintiff states that the USFSPA is a special law, the purpose of which is to allow former spouses of military members to receive court-ordered payments directly from the military without any periodic garnishment proceedings. This, the plaintiff contends, directly infringes upon the reserved powers of the states by assuming part of the police powers.

Plaintiff's seventh contention is that Congress has violated the principles of separation of powers and nondelegation of legislative powers by its adoption of 10 U.S.C. § 1408(c)(1), which provides that a court may treat disposable retired pay as property of both the military member and his spouse in accordance

with the law of jurisdiction of that court.

The eighth and final argument offered by the plaintiff in support of his summary judgment motion is that the 1980 divorce decree issued by the Texas state court is not a "court order" as required by the USFSPA.

2. Defendant

On May 21, 1990, the defendant filed a motion to dismiss and a response to the plaintiff's motion for summary judgment. In support of its position, the defendant offers two essential arguments. First, the defendant contends that the United States is immune from liability for USFSPA payments pursuant to the divorce decree issued by the Texas state court which is "regular on its face." The defendant states that the Tucker Act (28 U.S.C. § 1491), which the plaintiff cites as his jurisdictional basis, does not create a right of recovery against the United States, but rather grants jurisdiction when the right exists.

Furthermore, the defendant argues that the jurisdiction of the United States Claims Court to hear claims depends upon the extent to which the United States has waived immunity. As a result, defendant contends that the plaintiff must establish, in addition to the Tucker Act, a statutory or regulatory provision which grants him the right to the payment of money in order to be awarded jurisdiction in this court. Therefore, defendant states that because immunity has not been waived to permit a claim which challenges USFSPA payments to a former spouse pursuant to a divorce decree which is "regular on its face," the plaintiff has not met his burden of proving jurisdiction.

The defendant's second and final argument is that the plaintiff's challenge to the USFSPA is frivolous. In support of its position, the defendant states that the United States Court of Appeals for the Federal Circuit sustained the District Court for the Southern District of

Texas' judgment against the plaintiff issuing sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure. This holding was based upon a finding that the plaintiff's attacks on the USFSPA were frivolous and brought in a mean-spirited campaign of harassment designed to deprive Mrs. Goad of her right to the retired pay. As a result, the defendant argues that the district court's analysis of the plaintiff's claims demonstrate that they lack merit.

Discussion

1. Plaintiff's Motion For Summary Judgment

The plaintiff filed his motion for summary judgment on March 23, 1990. The disposition of a case on a motion for summary judgment is appropriate where there is no genuine issues as to any material fact and the movant is entitled to judgment as a matter of law. RUSCC 56(c). "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually

unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The process of summary judgment serves judicial economy and saves the expense and time of a full trial when it is deemed to be unnecessary. When the material facts are adequately developed, a full trial is useless. In this context, "useless" means that more evidence than is already available in connection with the motion for summary judgment could not reasonably be expected to change the result. Pure Gold, Inc. v. Syntex (U.S.A.). Inc., 739 F.2d 624, 626 (Fed.Cir. 1984), citing U.S. Steel Corp. v. Vasco Metals Corp., 394 F.2d 1009, 55 CCPA 1141, 157 USPQ 627 (1968). A material fact "is one which will make a difference in the result of a case." Curtis v. United States, 144 Ct.Cl. 194, 199, 168 F.Supp. 213, 216 (1958), cert. denied, 361 U.S. 843, 80 S.Ct. 94, 4 L.Ed.2d 81 (1959). The function of the judge is not "to weigh the evidence to determine the truth of the matter but to

determine whether there is a genuine issue for a trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The plaintiff, as the moving party, therefore, has the burden of establishing that there are no genuine issues in dispute and that he is entitled to judgment as a matter of law. Celotex Corp., 477 U.S. at 321, 106 S.Ct. at 2551, citing Catrett v. Johns-Manville Sales Corp., 244 U.S.App.D.C. 160, 163, 756 F.2d 181, 184 (1985). The defendant, as the party opposing the motion, then has the burden of providing sufficient evidence, not necessarily admissible at trial, to show that a genuine issue of material fact indeed exists. Id., 477 U.S. at 324, 106 S.Ct. at 2553. Any evidence presented by the defendant "is to be believed, and all justifiable inferences are to be drawn in [its] favor." Anderson, 477 U.S. at 255, 106 S.Ct. at 2513, citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970).

In this case the plaintiff moved for summary judgment. The defendant filed a response opposing the plaintiff's foregoing motion but did not cross-move for summary judgment. However, the defendant did file with its opposition a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to RUSCC 12(b)(4).

Therefore, before the summary judgment motion is address in this case, this court must first consider the defendant's motion to dismiss. The reason for this procedure is that if this court grants the defendant's motion to dismiss, the motion for summary judgment will, of course, become moot and, therefore, need not be addressed.

2. Defendant's Motion to Dismiss

The purpose of RUSCC 12(b) is to promote the expeditious presentation of defenses and objections. The defendant upon receipt of the complaint, and prior to filing a responsive pleading, has the option of presenting to the court in the

form of a motion to dismiss any of the following four defenses as stated in RUSCC 12(b):

> (1) How presented. ... [T]he following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) failure to state a claim upon which relief can be granted. ...

The defendant herein is moving pursuant to RUSCC 12(b)(4), in which case the court's inquiry is essentially limited to the content of the complaint.

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint shound be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1973). Therefore the court is limited to deciding the defendant's

motion to dismiss within the context of the well-established principle that the allegations of fact outlined in the complaint be "accepted and construed in the light most favorable to plaintiff." White Mountain Apache Tribe v. United States, 8 Cl.Ct. 677, 681 (1985); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) ("[i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). With these general guidelines regarding the Claims Court procedure for reviewing a motion to dismiss pursuant to RUSCC 12(b)(4), and for the reasons expressed hereinafter, this court must find in favor of the defendant and dismiss the plaintiff's complaint.

"The United States, as sovereign, is immune from suit," unless "it consents to be sued." United States v. Sherwood, 312 U.S. 584, 586 (1941), citing United States v. Thompson, 98 U.S. 486, 489 (1878) ("The United States possesses other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent."). An example of waiver of immunity is the Tucker Act, 28 U.S.C. § 1491 (1988), which confers jurisdiction upon the United States Claims Court:

> ... to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The Tucker Act, however, "is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages." United States v. Testan, 424 U.S. 392, 398

(1976). "The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists." Id. As a result of this federal statute, Mr. Goad has the burden of showing that the United States has waived its sovereign immunity to permit a claim challenging the USFSPA payments to his former spouse, pursuant to a divorce decree, through the AFAFC. In other words, absent a contract, Mr. Goad must show a statutory or constitutional provision affording him the right to the payment of money by the United States in order for this court to grant him jurisdiction over his claim. Mr. Goad has failed to meet this strict burden. In fact, another federal statutory provision explicitly removes any waiver of sovereign immunity on behalf of the United States with respect to the direct payment of funds to a military spouse. According to the USFSPA:

> The United States and any officer or employee of the United States shall not be liable with

> respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

10 U.S.C. § 1408(f)(1) (emphasis added). In view of the explicit foregoing provision, it is patently clear, therefore, that the United States has not waived its immunity to permit a claim challenging the USFSPA, as would be required by the Tucker Act.

If the divorce decree issued by the Texas state court in 1980 was not "regular on its face," then the provisions of 10 U.S.C. § 1408 (f)(1) would not apply, and the United States would not have disclaimed its liability. The plaintiff vehemently argues in his motion for summary judgment that this particular divorce decree is not a "court order that is regular on its face" as required by the USFSPA. The court emphatically disagrees.

10 U.S.C. § 1408(a)(2) defines a court order as:

> ... a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decre (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified or approved property settlement incident to such previously issued decree), which -
>
> (A) is issued in accordance with the laws of the jurisdiction of that court;
>
> (B) provided for -
>
> ******
>
> (iii) division of property (including a division of community property); and
>
> (C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

Furthermore, 10 U.S.C. § 1408(b)(2) states that:

> ... a court order is regular on its face if the order -
>
> (A) is issued by a court of competent jurisdiction;
>
> (B) is legal in form; and
>
> (C) included nothing on its face that provides reasonable notice that it is issued without authority of law.

The divorce decree at issue in this case unequivocally meets this criteria. With respect to the definition of court order outlined in 10 U.S.C. § 1408(a)(2), the decree involved is certainly a "final decree of divorce," the title of the document being "Decree of Divorce." In addition, the decree was issued "in accordance with the laws of the jurisdiction of that court"; more specifically, it was issued under Texas state law, and provides for a "division of property" within the contemplation of 10 U.S.C. § 1408(a)(2)(iii). Finally, the decree expressly provides for the division of property in an amount "expressed in dollars or as a percentage of disposable retired or retainer pay." Even though the decree actually gives a fraction of twelve twenty-sevenths (12/27) "of the United States Air Force Retirement benefits," this fraction mathematically equates to 44.44%, and a fraction is the equivalent of a percentage figure.

With respect to the criteria concerning whether the court order is "regular on its face" pursuant to 10 U.S.C. § 1408(b)(2), the evidence is similarly poignant. The order was issued by a court of competent jurisdiction - specifically the District Court of Brazos County, Texas, 272nd Judicial District. In addition, the order is in traditional legal form. For example, it is titled "Decree of Divorce"; it was signed by the presiding judge and the court clerk, with the formal stamp appended thereto; and it has a filing date and case number. Finally, there is nothing on the document that would provide "reasonable notice that it [was] issued without authority of law." As noted previously, everything within the document suggests that it is legal in form and content according to Texas state law. Moreover, on the last page, the clerk of the court duly certifies it to be a "true and correct copy of the original."

It should be noted that case law provides for a less stringent examination when considering whether an order is "regular on its face" versus the process for determining whether an order is substantively correct. As a general rule, the process of ascertaining whether such an order is regular on its face "demands no inquiry beyond the face of the document." Millard v. United States, 16 Cl.Ct. 485, 488 (1989), aff'd, 916 F.2d 1 (Fed.Cir. 1990), cert. denied, 111 S.Ct. 2012, 114 L.Ed.2d 99 (1991). Moreover, the Supreme Court, citing In re Matthews, 61 Comp.Gen. 229, 230-231 (1982), stated that:

> "The inquiry into whether an order is valid on its face is an examination of the procedural aspects of the legal process involved, not the substantive issues. Whether a process conforms or is regular 'on its face' means just that. Facial validity of a writ need not be determined 'upon the basis of scrutiny by a trained legal mind,' nor is facial validity to be judged in light of facts outside the writ's provisions which the person executing the writ may know."

See also United States v. Morton, 467 U.S. 822, 829 n.10, 104 S.Ct. 2769, 2773 n.10, 81 L.Ed.2d 680, 688 n.10 (1984) (The court here considered the breadth of inquiry necessary to validate an exercise of in personam jurisdiction over a nonresident defendant versus the inquiry necessary to determine whether legal process was "regular on its face." The court concluded that the jurisdictional inquiry required a strict evaluation of the facts and law, while the determination of whether the process was regular on its face was much more limited.).

Given the foregoing, it is patently clear that the divorce decree thoroughly satisfies the requirements set forth in 10 U.S.C. § 1408(f)(1). Therefore, the defendant has unequivocally met the requirements of the statute and has properly disclaimed any amenability to a lawsuit resulting from its payment to Mrs. Goad. In light of this reasoning,

we hold that the plaintiff has failed to state any facts upon which relief can be granted. The clarity of the language in the USFSPA, and the regularity of the divorce decree as a court order, have proven to be insurmountable obstacles for the plaintiff to overcome. Therefore the defendant's motion to dismiss is hereby GRANTED, and plaintiff's motion for summary judgment is DENIED as moot.

Conclusion

In 10 U.S.C. § 1408(f)(1), the United States disclaims liability with respect to any payment made to a former spouse from retired pay. Therefore, the United States has not waived its immunity with respect to this particular form of payment made to Mrs. Goad. Furthermore, because the divorce decree at issue in this case conforms to the requirements of the USFSPA, the plaintiff has no claim upon which to bring a suit in this court. As a result, this court must grant defendant's motion

to dismiss. Therefore, the plaintiff's summary judgment motion is denied as moot. Given the foregoing disposition, it is sufficient to say that numerous contentions averred by plaintiff are totally void of merit. The Clerk shall enter judgment accordingly. No costs.

IT IS SO ORDERED.

Order of October 2, 1992 entered by Clerk of the Federal Circuit denying motion for rehearing and declining suggestion for rehearing en banc.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

92-5053

ROLAND L. GOAD,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the Court will issue on October 9, 1992.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: October 2, 1992

By (signed)
Diane M. Frye
Chief Deputy Clerk

cc: ROLAND LEE GOAD
JAMES M. KINSELLA

Note: Pursuant to Fed. Cir. R. 47.8, this order is not citable as precedent. It is a public record.

Original Complaint filed in the Claims Court on January 22, 1990. Case dismissed for failure to state a claim in Goad v. United States, 24 Cl.Ct. 777 (1991), and affirmed on August 12, 1992 by the U.S. Court of Appeals for the Federal Circuit.

IN THE UNITED STATES CLAIMS COURT

NO. 90-72C

ROLAND L. GOAD, Plaintiff

v.

THE UNITED STATES, Defendant

ORIGINAL COMPLAINT

TO THE HONORABLE COURT:

Plaintiff brings this action against the United States to obtain a judgment for those amounts of his salary that have been unlawfully withheld since September 1, 1985.

I

JURISDICTION

Jurisdiction over this action is provided by Title 28, United States Code, Section

1491(a)(1) [1] (The Tucker Act).

II

FACTUAL MATTERS

1. Plaintiff is a member of the Regular Air Force on the retired list entitled to earn pay for his continuing military status and his availability for immediate recall to active duty by the Secretary of the Air Force at any time deemed in the interest of national defense. [2]

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1 / The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of the executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered as express or implied contracts with the United States.

2 / It is the policy of the Department of Defense to use military retirees to meet demands of mobilization or other emergencies. The Secretaries of the Military Departments are authorized to order any retired military member who has completed at least 20 years of [Continued]

2. Roland and Mary Beth Goad were divorced pursuant to a decree signed by a visiting judge in the 272nd District Court of Brazos County, Texas on September 19, 1980. (Exhibit A). In the apportionment of property, Mary Beth was awarded a fraction of Plaintiff's "Air Force Retirement benefits." (App. p. 3).

3. In McCarty v. McCarty, 453 U.S. 210 (1981), the Supreme Court held that the federal statutes then governing military retired pay prevented state courts from treating such pay as community property. The Court concluded that treating such pay as community property would do clear damage to important military personnel objectives. Id. at 228. In reaching this conclusion, the Court relied particularly

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2 / (Continued) active service to active duty at any time to perform duties deemed necessary in the interests of national defense in accordance with 10 U.S.C. 688. Military retirees, both regular and reserve may be ordered to active duty by the Secretaries of the Military Departments to satisfy mobilization requirements. 32 C.F.R. § 64.4.

on Congress' refusal to pass legislation that would have allowed former spouses to garnish military retired pay to satisfy property settlements. Id. at 228-32.

4. The Uniformed Services Former Spouses' Protection Act (USFSPA) was enacted effective February 1, 1983, purporting to retroactively annul McCarty. The Act requires that, in the case of a division of property, the decree must specify that payment is to be made from disposable retired pay. 10 U.S.C. § 1408(a)(2)(C). [3]

5. On June 24, 1985, Mary Beth Goad requested the Air Force to honor her divorce decree as a "court order" and to pay directly to her a portion of Plaintiff's disposable retired

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3 / ["Court Order" means a final decree of divorce which] in the case of a division of property, specifically provides for the payment of an amount expressed in dollars or as a percentage of disposable retired or retainer pay, from the disposable retired or retainer pay of a member to the spouse or former spouse of that member.

retired pay. (Ex. B, App. p. 5). Her request was immediately approved (Ex. C. p. 6) and payments began in September 1985 and have continued to the present time. Her request was not accompanied by any summons, writ, warrant, mandate, or other legal process from any court directed to the Air Force. Plaintiff's first (and only) notice that his pay was being garnished was sent to him after the Air Force had approved payments. (Exhibit C). The Air Force procedure does not provide for any prior notice or any opportunity for a hearing before garnishment actions are approved.

ACTIONS BY OTHER TRIBUNALS

6. In Goad v. United States, 661 F.Supp. 1073 (S.D.Tex. 1987), vacated in part, 837 F.2d 1096 (CAFC 1987) (table), cert. denied, 485 U.S. 906 (1988), it was held that the District Court lacked jurisdiction over Plaintiff's Tucker Act claims because during

the pendency of the case the amount of the claims had aggregated to more than the $10,000 ceiling for such claims in the District Court. The court stated that this Court had exclusive jurisdiction but refused to transfer the case "because to do so would not be in the interest of justice." 661 F.Supp. at 1077.

7. In Goad v. Goad, 768 S.W.2d 356 (Tex.App.-Texarkana 1989, writ denied), cert. denied, 110 S.Ct. [722] (Jan. 8, 1990) it was held that the State courts in Texas were without subject-matter jurisdiction to entertain Plaintiff's action seeking to quash, dissolve and recall the DD Form 2293 "Request For Former Spouse Payments From Retired Pay" (Exhibit B, p. 5) served on the Air Force on June 24 1985 by Mary Beth Goad.

8. In her plea to the jurisdiction, Mary Goad stated:

> This Court does not have subject matter jurisdiction over this cause of action

> because the alleged, and non-existent, writ of garnishment about which plaintiff complains is not a writ issued by any court within the State of Texas; because the defendant has taken no action within the territorial jurisdiction of the State of Texas which would give rise to a cause of action under the laws of the State of Texas; and because the question of the propriety of the Air Force action in complying with the Texas divorce decree is governed exclusively by federal law.

Exhibit D, page 8.

9. The trial court dismissed "for lack of subject matter jurisdiction." (Exhibit E, p. 9). In affirming the dismissal in the trial court, the appellate court asserted that the USFSPA does not give the State court jurisdiction to supervise the performance of the duties specifically delegated to the Armed Forces. 768 S.W.2d at 358.

JOINDER OF PERSON NEEDED FOR JUST ADJUDICATION

10. Mary Beth Goad, 1418 Antone Circle, College Station, Texas 77840 may have an interest in this litigation requiring that she be given an opportunity to appear and protect. She is

represented by counsel: Ms. Mary L. Sinderson, Attorney at Law, 24 Greenway Plaza, Suite 1601, Houston, Texas 77046. Accompanying this complaint is a motion pursuant to USCC Rule 14(a)(3) requesting the Court to notify Mary Beth Goad of this pending action.

CITATION OF STATUTES, REGULATIONS AND ORDERS

11. The Constitution permits Congress to vest authority in the heads of Departments to appoint such inferior officers as they think proper. U.S. CONST., Art. II, § 2, cl. 2. [4] Under this authority, Plaintiff was enlisted in the Armed Forces on September 23, 1947. In 1974, the Secretary of the Air

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4 / [The President] shall have power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senate present concur; and shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls. Judges of the supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the Appointment of such inferior Officers, as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Force approved Plaintiff's request to voluntarily be placed on the retired list of the Air Force pursuant to 10 U.S.C. § 8914. [5]

12. Public Law 98-94 (Defense Authorization Act) provided for accrual funding of the military retirement system and for the establishment of a Department of Defense Military Retirement Fund in 1985. The Fund is intended to cover the unfunded liability for retired and retainer pay for military personnel who served on active duty prior to 1985. Included in the unfunded liability are the consolidated requirements of the military departments to cover: 1) retired officers and enlisted personnel of the Army, Navy, Marine Corps, and

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5 / Under regulations to be prescribed by the Secretary of the Air Force, an enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired. A regular enlisted member then becomes a member of the Air Force Reserve. A member retired under this section shall perform such active duty as may be prescribed by law until his service under section 8925 of this title, plus his inactive service as a member of the Air Force Reserves, equals 30 years.

Air Force; 2) retainer pay of enlisted personnel of the Fleet Reserve of the Navy and Marine Corps; and 3) survivors benefits. Payments may be made from the Fund for "retired pay payable to persons on the retired lists of the Army, Navy, Air Force, and Marine Corps." 10 U.S.C. § 1463(a)(1). [6] No provision is made for disbursements from the Fund for a spouses' community property claim.

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6 / 10 U.S.C. § 1461(a): There is established on the books of the Treasury a fund known as the Department of Defense Military Retirement Fund (hereinafter in this chapter referred to as the "Fund"), which shall be administered by the Secretary of the Treasury. The Fund shall be used for the accumulation of funds in order to finance on an actuarially sound basis liabilities of the Department of Defense under military retirement and survivor benefit programs.
10 U.S.C. § 1463 Payments from the Fund
(a) There shall be paid from the Fund —
(1) retired pay payable to persons on the retired lists of the Army, Navy, Air Force, and Marine Corps;
(2) retainer pay payable to member of the Fleet Reserve and Fleet Marine Corps Reserve; and
(3) benefits payable under programs under the jurisdiction of the Department of Defense that provides annuities for survivors of members and former members of the armed forces; including chapter 73 of this title, section 4 of Public Law 92-425, and section 5 of Public Law 96-402.
(b) The assets of the Fund are hereby made available for payments under subsection (a).

13. No money shall be drawn from the Treasury, but in consequence of appropriations made by law. U.S.CONST., Art. I, § 9, cl. 7. (footnote 7)

BASIS FOR CLAIMS

14. The divorce decree (Exhibit A) does not qualify as a "court order" under the USFSPA. (Note 3).

15. Plaintiff's pay is exempt from execution, garnishment, levy or seizure in satisfaction of a community property claim.

16. Congress' declaration that the USFSPA is to apply to events which occurred before the effective date of the Act represents an attempt to retroactively apply new statutory language and to thereby annul a prior decision of the United States Supreme Court.

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7 / No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

This was an assumption, by Congress of a court of last resort in contravention of the principles of separation of powers.

17. Congress has acted in excess of its authority by delegating to state courts the authority to determine whether or not to apportion retired pay as community property.

Mary Beth Goad does not "own" a portion of Plaintiff's retired pay.

18. The "direct pay" procedures of the Air Force has deprived Plaintiff of his pay without due process of law.

19. The USFSPA is a special law enacted for the avowed purpose of allowing former spouses to receive court-awarded payments directly from the military finance centers without having to resort to periodic state garnishment procedures and therefore violates the equal protection of law as mandated by the Fifth Amendment of the United States Constitution. [8] [footnote 8 on next page]

UNTIL THE AIR FORCE HAS BEEN SERVED WITH "LEGAL PROCESS" ISSUED BY A COURT OF COMPETENT JURISDICTION, THERE EXISTS NO LAWFUL AUTHORITY FOR THE GOVERNMENT TO PAY FUNDS DIRECTLY TO MARY BETH GOAD OUT OF THE DEPARTMENT OF DEFENSE MILITARY RETIREMENT FUND.

RELIEF REQUESTED

20. Plaintiff requests an order from this Court requiring the "Request For Former Spouse Payments From Retired Pay" (Exhibit B) to be quashed, dissolved and recalled.

21. Plaintiff requests judgment against the United States and in favor of the Plaintiff

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8 / No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. CONST., Amendment V.

for those amounts of his pay that have been withheld since September 1, 1985 as fully set out in Appendix F.

20. Plaintiff requests such other and further relief which he may show himself to be entitled.

Respectfully submitted.

January 22, 1990

(signed)
ROLAND L. GOAD, Plaintiff
(pro se)
310 Sara Lane
Huntsville, Texas 77340
(409) 291-2430

Excerpts from Petitioner's brief in support of summary judgment filed in the Claims Court on March 23, 1990 showing the issues presented to the Claims Court:

QUESTIONS PRESENTED

1. Does the anti-assignment statute [37 U.S.C. § 701(c)] remain valid notwithstanding passage of the USFSPA purporting to nullify its application to community property claims?

2. Is Plaintiff's pay exempt from garnishment for satisfaction of a community property award?

3. Did the Texas divorce court have *in rem* or *quasi-in-rem* jurisdiction over Plaintiff's pay so as to be authorized to partition it as community property?

4. Is military retired pay earned for personal services after divorce a part of the "estate of the parties." ?

5. Does the USFSPA violate "due process of law" by failing to provide any meaningful forum for challenging its application to

Plaintiff's pay?

6. Does the USFSPA violate "equal protection under the law" by providing special privileges to former spouses?

7. In the USFSPA, has Congress impermissibly delegated part of its legislative power to State courts?

8. Does the 1980 divorce decree apportioning "Air Force Retirement benefits" qualify as a "court order" under the USFSPA?

Excerpts from Petitioner's brief filed in the Federal Circuit on March 2, 1992 stating the issues presented for review on appeal:

THE STATEMENT OF THE ISSUES

[1] Section 1463(a)(1) of Title 10, United States Code provides for a monthly payment to Appellant out of the DOD Military Retirement Fund. Does that statute provide the jurisdictional basis for an action in the United States Claims Court for the recovery of amounts of Appellant's salary withheld since September 1, 1985?

[2] The Claims Court dismissed Appellant's claims for failure to state a claim upon which relief could be had and in doing so made extensive use of the "administrative record" submitted by the Government, but declined to consider Appellant's motion for summary judgment or any of the material submitted in support of the motion. Was this reversible error?

[3] Mary Beth Goad's ex parte application

for payments from Appellant's retired pay was approved by the Air Force before Appellant received his first notice that the application had been submitted. The procedures established under the USFSPA do not provide any opportunity for a hearing before approval of such ex parte applications. Do these procedures established under the USFSPA meet the minimum requirements of "due process" under the Fifth Amendment of the United States Constitution?

[4] In respect to property awards, Section 1408(a)(2)(C) of Title 10, United States Code, requires a "court order" to provide an amount expressed in dollars or as a percentage of "disposable retired pay." Does a 1980 decree of divorce apportioning a fraction of "Air Force Retirement benefits" satisfy this requirement of a "court order"?

[5] Has the United States been served with "legal process" issued by a "court of

competent jurisdiction" directed at Appellant's "disposable retired pay" authorizing it to withhold a portion of such pay under the Uniformed Services Former Spouses' Protection Act?

[6] Did the Uniformed Services Former Spouses' Protection Act (USFSPA) [10 U.D.C. § 1408] amend, supersede, attenuate, or rescind the anti-assignment statute [37 U.S.C. § 701(c)] which provides that an enlisted member of the Army, Navy, Air Force, or Marine Corps may not assign his pay, and if he does so, the assignment is void?